IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
THIS DOCUMENT RELATES TO: Member Case H-02-0576	§	
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
RALPH A. WILT, JR., Plaintiff, VS. ANDREW S. FASTOW, ET AL., Defendants.	§	CIVIL ACTION NO. H-02-0576

ORDER

Pending before the Court are Certain Defendants'[1] motion to strike (instrument #604) the first amended complaint in Wilt v.

[1] Arthur Andersen, LLP, Kenneth L. lay, Jeffrey K. Skilling, Andrew S. Fastow, Richard A. Causey, James V. Derrick, jr., Mark A. Frevert, Stanley C. Horton, Kenneth D. Rice, Richard B. Buy, Joseph M. Hirko, ken L. Harrison, Steven J. Kean, Rebecca P. Mark-Jusbasche, Michael S. McConnell, Jeffrey McMahon, Cindy K. Olson, Mark E. Koenig, Kevin P. Hannon, Lawrence Greg Whalley, Robert A. Belfer, Norman P. Blake, Ronnie C. Chan, John H. Duncan, Wendy L. Gramm, Robert k. Jaedicke, Charles A. LeMaistre, Joe H. Foy, John A. Urquhart, Thomas H. Bauer, Debra A. Cash, David Stephen Goddard, Jr., Michael M. Lowther, Michael C. Odam, John E. Stewart, Benjamin S. Neuhausen, Nancy Temple, Roger D. Willard, Michael J. Kopper, Vinson & Elkins, L.L.P., Ronald T. Astin, Joseph Dilg, Michael P. Finch, Max Hendrick, III, [Estate of] J. Clifford Baxter, Mark J. Metts, and Paula Rieker.

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Fastow[2] and Defendants C.E. Andrews,[3] Dorsey L. Baskin, Jr., Joseph F. Berardino, Gregory J. Jonas, Robert Kutsenda, Steve M. Samek, John E. Stewart, and Nancy A. Temple's (collectively, "the Andrews Defendants'") motion to dismiss the Wilt complaint as against each one of them individually for lack of personal jurisdiction (#617), pursuant to Fed. R. Civ. P. 12(b)(2).

The original Wilt complaint, which was filed on February 14, 2001 in this Court, based on diversity jurisdiction, after Judge Rosenthal ordered the consolidation of all Enron-related litigation, alleged only state-law causes of action under Texas Business & Commerce Code § 27.01 (Fraud in Stock Transactions and Civil Conspiracy) and Texas common law (fraud and civil conspiracy), against 58 named defendants and 500 unnamed defendants, including Enron officers and directors, Arthur Andersen entities, partners and employees across the globe, and Vincent and Elkins, LLP and some of its partners. On February 15, 2002, this Court named a Lead Plaintiff and Lead Counsel in Newby, emphasized the need for coordinating the massive litigation arising out of a common core of facts and legal issues and involving overlapping parties, and decided not to subdivide the action into separate classes until the time of class certification. On February 18, 2002, Wilt was consolidated into Newby without objection from Ralph A. Wilt, Jr., who concurred

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[2] #429 in H-01-3624.

[3] Defendant C.E. Andrews, pursuant to a Notice of Dismissal (#499), was dismissed on April 22, 2002 under Fed. R.Civ. P. 41(a) in instrument #526. The instant motion remains pending as to the other movants. Thus the Court does not address the arguments relating to Andrews.

that there was a common core of fact and law involved that was well served by consolidation.[4] On February 27, 2002 this Court entered a scheduling order requiring the filing of a consolidated complaint. On April 1, 2002, Wilt with two new Plaintiffs, Kiernan J. Mahoney and David I. Levine, filed the first amended complaint now in dispute, still grounded in state law, and added two additional individual defendants, Jeannot Blanchette and John E. Stewart.

Certain Defendants move to strike the first amended complaint pursuant to the Court's inherent authority to control and manage the cases before it, Rule 42(a)(empowering the court to consolidate cases having common questions of law or fact and "to make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay"), and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, codified at various places including 15 U.S.C. § 78u-4(a)(3). They maintain that the Court's powers permit it to consolidate individual actions as well as class actions, appoint a lead plaintiff to file a single consolidated complaint, and direct litigation in a coordinated manner, at least until class certification. Because the Court had demonstrated its intent to do so in orders throughout this litigation, Certain Defendants

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[4] Defendant Vinson & Elkins had filed a motion opposing consolidation of Wilt into Newby and seeking severance, but withdrew the motion after Vinson & Elkins was named as a Defendant in Lead Plaintiff's consolidated complaint. In response to Vinson & Elkins' motion, Ralph A. Wilt, Jr. expressed his support for the consolidation.

argue that permitting individual Plaintiffs to file individual pleadings in addition to and alongside the consolidated complaint at this time, thus requiring Defendants to respond to multiple complaints, would defeat the very purpose of a consolidated pleading.

Plaintiffs Ralph A. Wilt, Jr. ("Wilt"), Kiernan J. Mahoney, and David I. Levine ("the Wilt Plaintiffs) oppose the motion to strike on several grounds: (a) since no responsive pleading had been filed to Wilt's original complaint, two new Plaintiffs were entitled to join the consolidated Newby action by joining Wilt and filing the first amended complaint rather than filing an equivalent, separate individual action; (b) the first amended complaint corrected typographical errors and added "discrete" factual allegations; (c) Certain Defendants cite no authority to justify striking the first amended complaint; (d) the order of consolidation does not obliterate the individual actions that are consolidated into Newby[5]; and (e) the first amended complaint was filed in compliance with the deadline in the Court's

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[5] See, e.g., Johnson v. Manhattan Railway Co., 289 U.S. 479, 496-97 (1933)("consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause or change the rights of the parties or make those parties in one suit parties in another"); Miller v. United States Postal Service, 729 F.2d 1033, 1036 (5th Cir. 1984)("consolidation does not so completely merge the two cases as to deprive a party of any substantial rights that he may have had if the actions had proceeded separately, for the two suits retain their separate identities and each requires the entry of a separate judgment").

scheduling order and Rule 15(a) permitting amendment as a matter of right before a responsive pleading is filed. Instrument #805.[6]

In reply (#805) Certain Defendants insist that the Wilt Plaintiffs have misconstrued their motion to strike. They explain it is an effort to ensure the orderly and efficient progress of the Newby litigation, and that once the proceedings have reached an appropriate stage, the Wilt Plaintiffs can re-file their amended complaint.

This Court agrees with Certain Defendants that to ensure orderly progress of this consolidated multi-district litigation, certain compromises need to be imposed, but no Plaintiff will be forced to give up legally valid causes of action. The Wilt Plaintiffs have previously agreed that the factual and legal issues raised by their state-law claims overlap those of Plaintiffs suing under federal securities laws, and thus coordinated discovery in a litigation involving so many parties is essential and should allow Plaintiffs adequate opportunity to uncover facts relating to their claims. In addition the participation of the Wilt Plaintiffs may facilitate settlement negotiations. Furthermore, once any motion to dismiss claims

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[6] Certain Defendants have also filed a motion for entry of preliminary scheduling order for complaints consolidated into Newby and pursued by persons other than court-appointed Lead Plaintiff to address Wilt and other complaints that assert such state-law claims. The Wilt Plaintiffs' response argues that they are entitled to their own schedule and to begin discovery without waiting for the Court to rule on the motions to dismiss in the federal law cases. Certain Defendants contend that the Wilt Plaintiffs' position in that response is contrary to their earlier endorsement of the consolidation and to its purpose, and also untimely.

arising under the federal securities statutes is filed by any defendant, the provision of the Private Securities Litigation Reform Act ("PSLRA"), automatically staying "all discovery," 15 U.S.C. § 78u-4(b)(3)(B),[7] is triggered until the motions to dismiss are resolved. Plaintiffs have not demonstrated that either of the two exceptions has been met here, i.e., that there is a threat that the evidence will be lost or destroyed or that particularized discovery is need to avoid irreparable harm and undue prejudice.[8] See generally Angell Investments, L.L.C. v. Purizer Corp., 177 F. Supp.2d 162 (N.D. Ill. 2001); In re CFS-Related Securities Fraud Litigation, 179 F. Supp.2d 1260, 1263-65 (N.D. Okla. 2001)(staying discovery even against a defendant that did not file a motion to dismiss).[9] Moreover, as the record in

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[7] Section 78u-4(b)(3)(B), provides,

> In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.

[8] "Undue prejudice" is harm that is "improper or unfair under the circumstances." CFS-Related Sec. Fraud Litig., 179 F. Supp. 2d at 1265, citing Medical Imaging Centers of America, Inc. v. Lichtenstein, 917 F.Supp. 717, 720 (S.D. Ca. 1996). The delay inherent in the PSLRA's automatic discovery stay cannot constitute "undue" prejudice because it is neither improper nor unfair, but "prejudice that has been mandated by Congress after a balancing of various policy interests at stake in securities litigation, including a plaintiff's need to collect and preserve evidence." Id.

[9] See also Tobias Holdings, Inc. v. Bank United Corp., 2001 WL 921168 (S.D.N.Y.)(finding that state law claims of fraud, breach of contract, conspiracy and tortious interference with contract arose from same set of facts as federal securities claims

this litigation reflects, this Court has stayed discovery pursuant to the PSLRA in several state-law-based member actions in Newby, i.e., Rosen, Ahlich, Pearson, and Delgado, as well as in a concurrent state court case, Bullock. If some Plaintiffs were allowed to proceed while others must wait, the Court's efforts to achieve efficiency and economy in coordinating all and to avoid multiple rounds of discovery will be undermined. Nevertheless, because the Wilt Plaintiffs are entitled to pursue their state-law claims in federal court based on diversity jurisdiction, and to allow the two newly named Plaintiffs to enter this litigation, rather than strike the first amended complaint, the Court will merely stay it and permit the Wilt Plaintiffs to move to reinstate it at an appropriate time.

The Andrews Defendants, with supporting affidavits, contend that pursuant to the allegations in the Wilt Plaintiffs' first amended complaint, the Court lacks personal jurisdiction, both specific and general, over them as individuals and the claims against them must be dismissed pursuant to Fed. R. Civ. P. 12(b)(2).

Federal Rule of Civil Procedure 4(e) permits a district court to assert personal jurisdiction over a nonresident in a diversity action to the extent allowed under the law of the state

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but were "separate and distinct" from the federal claims and concluding that the automatic stay under the PSLRA does not apply to non-fraud state law claims brought under diversity jurisdiction). The Wilt Plaintiffs' claims are not distinct from the federal securities claims, but are fraud-based and substantively overlapping. Thus the stay should apply to their suit.

where the district court sits. A Texas court has personal jurisdiction under the Texas long-arm statute over a foreign defendant that "does business" in Texas. i.e., that (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in Texas; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside of Texas. Tex. Civ. Prac. & Rem. Code § 17.042-.045 (West 1999). The Texas Supreme Court has interpreted the language of its long-arm statute to reach as far as the federal constitutional requirements of due process will allow. Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990). Thus the Court examines the due process requirements.

A party's liberty interest under the fourteenth amendment protects it from being subjected to binding judgments of a forum with which it has established no meaningful contacts, ties or relations.'" Guidry v. U.S. Tobacco Co., Inc., 188 F.3d 619, 623 (5th Cir. 1999), quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985), and International Shoe v. Washington, 326 U.S. 310, 319 (1945). The due process clause requires that a foreign defendant have "minimum contacts" with the forum state so that the maintenance of a suit does not offend "traditional notions of fair play and substantial justice." Id., citing International Shoe, 326 U.S. at 316. For minimum contacts, a nonresident defendant must have purposefully availed himself of the privilege of conducting activities within the forum state,

thereby invoking the benefits and protections of its laws. Gardemal v. Westin Hotel Co., 186 F.3d 588, 595 (5th Cir. 1999).

Where a nonresident defendant has sufficient "continuous and systematic" contacts with the state in which the suit is pending, the court may exercise "general" personal jurisdiction over that party in a cause of action that does not arise out of or relate to that defendant's contacts with the forum state. Guidry, 188 F.3d at 623, citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). "Continuous and systematic contacts" are required by the due process clause because the forum state does not have a direct interest in the cause of action. Gardemal, 186 F.3d at 595. Thus the minimum contacts review is more demanding and broader for general jurisdiction and requires the plaintiff to demonstrate substantial activities in the forum state. Id.

Where the controversy "is related to or 'arises out of' [the defendant's] contacts with the forum," the district court may exercise "specific" personal jurisdiction. Guidry, 168 F.3d at 623, citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977). The court must examine the relationship among the defendant, the forum state, and the litigation to determine whether the defendant purposefully established "minimum contacts" with the forum state that made it foreseeable that it should "reasonably anticipate being haled into court there." Id. at 625, citing Burger King, 471 U.S. at 474. To decide if there is specific jurisdiction, the district court must apply a three-prong test: (1) whether the

defendant has minimum contacts with the forum state, i.e., did it purposely direct its activities toward the forum state or purposely avail itself of the privilege of conducting activities there; (2) did the plaintiff's cause of action arise out of or result from the defendant's forum-related contacts; and (3) would the exercise of personal jurisdiction be fair and reasonable? Id.

If the court finds that the foreign defendant's related or unrelated contacts with the forum state are sufficient, it then examines whether the exercise of jurisdiction is "fair" by examining several factors relating to 'traditional notions of fair play and substantial justice": (1) the burden on the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in the most efficient resolution of controversies; and (5) the shared interests of the several states in furthering fundamental social policies. Felch v. Transportes Lar-Mex SA de CV, 92 F.3d 320, 324 (5th Cir. 1996).

The party that invokes a federal court's jurisdiction bears the burden of establishing minimum contacts that warrant the exercise of personal jurisdiction over a foreign defendant. Id., citing Bullion v. Gillespie, 895 F.2d 213, 216 (5th Cir. 1990). If the court rules on a motion to dismiss for lack of jurisdiction without holding an evidentiary hearing, the nonmoving party need only make a prima facie showing, through pleadings, depositions, affidavits, exhibits, or any combination of recognized methods of discovery, of minimum contacts of each

defendant to support specific personal jurisdiction and demonstrate that the cause of action arose out of that defendant's forum-related contacts; the court must accept as true the nonmovant's allegations and resolve all factual disputes in its favor. Id., citing Latshaw v. Johnston, 167 F.3d 208, 211 (5th Cir. 1999), and Bullion, 895 F.2d at 217 ("uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor"); Colwell Realty Investments v. Triple T Inns of Arizona, 785 F.2d 1330, 1333 (5th Cir. 1986). Ultimately, the plaintiff must establish personal jurisdiction by a preponderance of the evidence either at a pretrial evidentiary hearing or at trial. Felch, 92 F.3d at 326, citing Travelers Indem. Co. v. Calvert Fire Ins. Co., 798 F.2d 826, 831 (5th Cir. 1986), modified on rehearing in unrelated part, 836 F.2d 850 (5th Cir. 1988), and DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1270-71 & n. 12 (5th Cir. 1986)(only where the district court decides a motion to dismiss for lack of personal jurisdiction without a hearing may the plaintiffs satisfy their burden by presenting a prima facie case).

A dismissal for lack of personal jurisdiction is not a dismissal on the merits and must therefore be without prejudice. Guidry, 188 F.3d at 623.

The individual Andrews Defendants emphasize the vague and sweeping allegations in the complaint, which alleges a generalized conspiracy among three organizational Andersen

entities[10] (identified as Andersen, Andersen Worldwide, and Arthur Andersen L.L.P., collectively "AA"), a number of its partners and employees, and numerous Enron officials, attorneys and employees, to conceal material information about Enron's financial status, fraudulent conduct, document destruction, etc. The complaint does not identify specific conduct by the Andrews Defendants as individuals nor any conduct directed at or connected to Texas, nor does it allege that the Andrews Defendants had continuous and systematic contacts with Texas. Defendants maintain that there are no allegations of the kind of continuous and systematic contacts necessary to support the exercise of personal jurisdiction. Their affidavits demonstrate that all live and work in other states in Texas and do not have business interests in the state.[11]

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[10] The complaint states that "Defendant Andersen is either a partnership or other type of unincorporated association consisting of member firms within 'the Andersen global client service network'" that "promotes itself as a single, integrated, full-service, professional business enterprise comprising 'one firm' with 'one voice' and a 'shared heritage and common values and vision.'" First Amended Complaint (#429) at 14. The three entities are allegedly "alter egos of each other. Id. at 15. AA is sued "as a direct participant, aider and abettor, and co-conspirator in the fraudulent acts, omission and scheme set forth" in the complaint. id. at 14-15

[11] C.E. Andrews is a partner in Andersen and a resident of Virginia; Baskin is also a partner in Andersen and a resident of Illinois; Berardino is also a partner and a resident of Connecticut; Jonas is a retired partner of Andersen and a resident of Illinois; Kutsenda is a resident of Illinois; Samek is a partner of Andersen and Managing Partner for the United States; Stewart is a partner, a member of the Financial Reporting Committee of the Institute of Management Accountants, Head of the U.S. Accounting Principles Group of Andersen's U.S. Professional Services Group, and a resident of Illinois; and Temple is a director of Andersen and an Illinois resident.

Defendants highlight established law that personal jurisdiction cannot be exercised over one partner merely because another partner or their partnership is subject to personal jurisdiction. Nikolai v. Strate, 922 S.W.2d 229, 241 (Tex. App.-- Fort Worth 1996, writ denied)("Texas law is clear that a business's contacts may not be imputed to its personnel to establish personal jurisdiction"); Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 437-38 (Tex. 1982)("it is the contacts of the defendant himself that are determinative"); Sher v. Johnson, 911 F.2d 1357, 1366 (9th Cir. 1990)("a partner's actions may be imputed to the partnership for the purpose of establishing minimum contacts, but ordinarily may not be imputed to other partners"); Vosko v. Chase Manhattan Bank, N.A., 909 S.W.2d 95, 99 (Tex. App.-- Houston [14th Dist.] 1995, writ denied)("jurisdiction over an individual cannot be based on jurisdiction over a corporation with which he is associated unless the corporation is the alter ego of the individual").

The Andrews Defendants also argue that in accord with the rule that jurisdictional contacts must always be analyzed separately as to each defendant, "conclusory allegations of conspiracy" between resident and nonresident Defendants are inadequate to provide a basis for jurisdiction over non-residents. Thomas v. Kadish, 748 F.2d 276, 282 (5th Cir. 1984)("neither the present conclusory allegations of conspiracy by the California defendants based upon their acts in California, nor the alleged effects of this conspiracy in Texas, show a claim of sufficient

minimum contacts with Texas that would support personal jurisdiction of Texas courts against these defendants for their acts in California"), cert. denied, 473 U.S. 907 (1985); Vosko, 909 S.W.2d at 100 (Texas Supreme Court requires for personal jurisdiction over a nonresident defendant that the nonresident defendant must have purposefully established minimum contacts with Texas to satisfy due process; no jurisdiction over non-resident defendant based on alleged conspiracy with resident where court was "unable to find an allegation or evidence of a specific act by [non-resident] in Texas in furtherance of [the] conspiracy"); Hawkins v. Upjohn Co., 890 F. Supp. 601, 608 (E.D. Tex. 1994)("[N]o court has conferred jurisdiction over an alleged conspirator merely because jurisdiction exists as to a fellow alleged conspirator"); Star Technology, Inc. v. Tultex Corp., 844 F. Supp. 295, 299 (N.D. Tex. 1993)("Although Plaintiff accuses [nonresident defendant] of conspiracy, that allegation alone will not support the Court's exercise of jurisdiction absent minimum contacts.").

The Andrews Defendants assert that the complaint

> fails to specifically attribute any Texas contacts whatsoever to defendants Andrews, Baskin, Berardino, Jonas, Kutsenda, or Samek. These defendants are mentioned by name only once each in the complaint, in introductory paragraphs that broadly accuse them of participation in the entire 'scheme' that plaintiffs purport to describe. The complaint sets forth no specific acts by these defendants in furtherance of the alleged fraud, and nowhere is it made clear whether or how these defendants' supposed participation involved any contact on their part with the state of Texas. Plaintiffs lump . . . all the

> Moving Defendants . . . into the class of "Accountant Defendants" along with Andersen and every other individual defendant who ever worked for Andersen. They then direct at the entire class almost every allegation made against any member of it. In doing so they attempt to accomplish with vague pleading something they can not achieve as a matter of legal principle: the exercise of jurisdiction over one defendant based on the contacts of another.

#617 at 9.

The Andrews Defendants concede that the complaint does allege a single, isolated, attenuated contact for John Stewart (participating in Chicago by telephone in a meeting among Andersen personnel, some of whom were in Houston, involving a debate about Andersen's relationship with Enron,[12] Complaint at paragraphs 66 and 232) and a few contacts for Nancy Temple that are too restricted and remote from Plaintiffs' cause of action to support personal jurisdiction over Stewart and Temple. See, e.g., Marathon Oil v. Ruhrgas, 182 F.3d 291, 295 (5th Cir. 1999)(in a fraud action, defendant's presence at three meetings in Houston and participation in correspondence and phone calls was not sufficient to establish minimum contacts because there was no evidence that

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[12] The Andrews Defendants argue that Plaintiffs' cause of action against "Accountant Defendants" is based on their issuance of audit reports on Enron's financial statements and on participation in preparing statements regarding Enron's financial condition. They insist, "The mere suggestion that Mr. Stewart was included in a discussion on Andersen's relations with Enron does nothing to indicate that he contributed to the allegedly false statements on which plaintiffs' claims are based." #617 at 11. They characterize Plaintiffs' efforts to assert personal jurisdiction as "at bottom nothing more than a variant of the conspiracy theory of jurisdiction." Id.

the "false statements at the meetings or that the alleged tortious conduct was aimed at activities in Texas"); Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 778 (5th Cir. 1986) (refusing to exercise specific jurisdiction where an Oklahoma defendant entered into a contract with a Texas corporation and sent a final agreement to Texas, sent three checks in partial performance to Texas, and had "extensive telephonic and written communications" with a resident of the forum state; "merely contracting with a resident of the forum state is insufficient to support an exercise of specific jurisdiction"), cert. denied, 481 U.S. 1015 (1987); Dynamo, L.P. v. Warehouse of Vending & Games, 168 F. Supp. 616, 620-21 (N.D. Tex. 2001)(in contract and fraud action, exchange of phone calls and purchase of goods was held insufficient to support exercise of jurisdiction); Smirch v. Allied Shipyard, Inc., 164 F. Supp.2d 903, 907 (S.D. Tex. 2001)(no specific jurisdiction where defendant contracted with Texas residents, sent repair bills to Texas, placed phone calls to plaintiffs in Texas, and faxed invoice reports to plaintiffs in Texas).

As for Nancy Temple, the complaint does not allege that she had any involvement in any of the allegedly fraudulent representations that give rise to Plaintiffs' claims. The allegations against Temple relate to actions occurring long after the issuance of any targeted statement by Andersen, and long after the last of Plaintiffs' stock purchases in May 2001 so they could not have relied on any of her challenged conduct. The complaint states that Temple sent an October 12, 2001 e-mail to an Andersen

partner in Houston referring to Andersen's document retention policy, subsequently asked about the Houston office's compliance with that policy, and e-mailed an Andersen partner in Houston around October 26, 2001 to request that he remove her name from "one or more" documents. Such occasional correspondence by telephone, e-mail, or other means, does not rise to purposeful availment, insist the Andrews Defendants. Stuart v. Spademen, 772 F.2d 1185, 1189 (5th Cir. 1985); Smirch, 164 F. Supp.2d at 907.

In response, the Wilt Plaintiffs quote large sections of their first amended complaint, which nevertheless fail to controvert Defendants' arguments. The Court has reviewed the first amended complaint in its entirety and notes that it speaks for itself. For instance, one quoted paragraph states that around February 6, 2001, Jonas[13] sent a memo to David Duncan and Bauer about the February 5, 2001 meeting conducted by Accountant Defendants over the telephone and in various cities about Enron's problems and the Account Defendants' knowledge of, involvement in and responsibility for those problems. The complaint states that that memo "confirms that Defendants Samek, Jonas, Kutsenda, and Stewart directly participated in the events." A mere conference call among Andersen employees across the United States is insufficient to justify this Court's exercise of personal jurisdiction over these nonresident individual defendants. The pleadings says nothing that would show that these individulas purposely availed themselves of the privilege of conducting

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[13] Misspelled as "Jones." #797 at 5.

activities within Texas, thereby invoking the benefits and protections of its laws, nor performed any act in Texas in furtherance of the alleged conspiracy or scheme, nor maintained continuous and systematic contacts with Texas. The same is true for allegations against Berardino and Baskin.

Plaintiffs contend that in addition to its conspiracy allegations and the allegations discussed supra by the Andrews Defendants, because this Court already held a hearing and found it had personal jurisdiction over Temple, the motion to dismiss should be summarily denied as to her.

Plaintiffs appear to be confusing the standards applied to determine whether they have stated a claim for which relief can be granted under Rule 12(b)(6) with those for determining whether a court in Houston, Texas has personal jurisdiction over an Illinois resident who works at an Illinois branch of Arthur Andersen. The issue of personal jurisdiction based on minimum contacts was never raised or analyzed regarding Temple. Initially the Court found that her attorneys had made several agreements with other counsel in Newby to schedule her deposition in Houston and then canceled each at the last minute. Based on these agreements and because she was an employee of Defendant Arthur Andersen, LLP, which is subject to personal jurisdiction here, the Court ordered that Temple appear in Houston for the deposition. Her attorneys then raised for the first time an objection that she was not a party to the Newby case, and therefore under Federal Rule of Civil Procedure 45(b)(2), she had to be subpoenaed for her deposition by

the United States District Court for the Northern District of Illinois for a deposition within its 100-mile territorial limit. The Court subsequently found that Temple had been served in the Wilt case, that she therefore was a party in Newby not subject to Rule 45's 100-mile territorial restriction, and thus ordered her to appear. Ultimately the question became moot when she appeared in Houston and asserted her fifth amendment privilege. See instruments #366, 367, 374, 376, 378, 382, 383. Only in the instant responsive pleading has Temple moved to dismiss for lack of minimum contacts under Fed. R. Civ. P. 12(b)(2).

The Wilt Plaintiffs also argue that because the Andrews Defendants committed tortious acts outside of Texas that had effects in Texas, this Court should exercise specific jurisdiction over these individuals. Hawkins, 890 F. Supp. at 608, relying upon Calder v. Jones, 465 U.S. 783 (1984), and Keeton v. Hustler, 465 U.S. 770 (1984). Defendants have already demonstrated that as a matter of law, this argument will not save the claims against them without specific allegations of minimum contacts with the forum or of acts performed in Texas in furtherance of the alleged conspiracy. Thomas v. Kadish, 748 F.2d at 282 ("neither the present conclusory allegations of conspiracy by the California defendants based upon their acts in California, nor the alleged effects of this conspiracy in Texas, show a claim of sufficient minimum contacts with Texas that would support personal jurisdiction of Texas courts against these defendants for their acts in California"); Vosko, 909 S.W.2d at 100 (Texas Supreme Court

requires for personal jurisdiction over a nonresident defendant that the nonresident defendant must have purposefully established minimum contacts with Texas to satisfy due process; no jurisdiction over non-resident defendant based on alleged conspiracy with resident where court was "unable to find an allegation or evidence of a specific act by [non-resident] in Texas in furtherance of [the] conspiracy"); Hawkins, 890 F. Supp. at 608 ("[N]o court has conferred jurisdiction over an alleged conspirator merely because jurisdiction exists as to a fellow alleged conspirator"); Star Technology, Inc., 844 F. Supp. at 299 ("Although Plaintiff accuses [nonresident defendant] of conspiracy, that allegation alone will not support the Court's exercise of jurisdiction absent minimum contacts.").

Nevertheless, this Court observes the Lead Plaintiff's Consolidated Complaint makes more detailed allegations about the roles of John Stewart, Joseph Berardino, and Nancy Temple in the alleged securities violations that may support personal jurisdiction over these three. For this reasons at this time the Court will not dismiss the Wilt Plaintiffs' claims against Stewart, Berardino, and Temple.

Finally the Wilt Plaintiffs ask for an opportunity for discovery on the jurisdiction issue if the Court finds their pleadings insufficient to exercise personal jurisdiction. With respect to Defendants Baskin, Jonas, Kutsenda and Samek, the Court points out that given the fact that this case is subject to the automatic stay of the PSLRA, additional delay would impose a heavy

burden upon them if they were required to remain in this suit. Furthermore, despite tremendous publicity about Enron's collapse and the Arthur Andersen criminal trial, the Wilt Plaintiffs have not supplemented their arguments with any specific allegations about these four Defendants to support personal jurisdiction over them. Nor have these Defendants been named in any other case consolidated into Newby. Thus the Court finds that dismissal under Rule 12(b)(2) is appropriate as to them.

Accordingly, for the reasons indicated above, the Court

ORDERS that Certain Defendants' motion to strike is DENIED. Nevertheless, the Court further

ORDERS that the Wilt Plaintiffs' first amended complaint (#429) is STAYED, but leave is granted to them to move to reinstate that complaint at an appropriate time, i.e., at the time of class certification or trial.

Finally, the Court

ORDERS that the Andrews Defendants' motion to dismiss for lack of personal jurisdiction is GRANTED as to Defendants Dorsey L. Baskin, Jr., Gregory J. Jonas, Robert Kutsenda, and/or Steve M. Samek and that the Wilt Plaintiffs claims against these four are DISMISSED without prejudice. Should Plaintiffs in the future discover facts that would support personal jurisdiction over Baskin, Jonas, Kutsenda, and Samek, Plaintiffs may move to rejoin any or all as Defendants. The Court further

ORDERS that Andrews Defendants' motion to dismiss is DENIED as to Defendants Joseph F. Berardino, John E. Stewart and Nancy Temple. The motion to dismiss is MOOT as to C.E. Andrews.

SIGNED at Houston, Texas, this 5th day of August, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE